

1 MR. HAIL: Yes.

2 THE COURT: So, you're not asking me to  
3 do anything with that Judgment other than to rule,  
4 but under the indemnity, Dorado agreed to  
5 indemnify you for that act --

6 MR. HAIL: Yes.

7 THE COURT: -- for those damages?

8 MR. HAIL: Yes, I believe that's  
9 accurate.

10 THE COURT: All right. Then I get it.

11 MR. HAIL: Okay.

12 THE COURT: So that -- so, essentially  
13 deciding that issue just turns on whether or not  
14 the indemnity provision is broad enough for Dorado  
15 to have agreed to indemnify you from a claim it  
16 successfully prosecuted against you?

17 MR. HAIL: Yes.

18 THE COURT: Okay.

19 MR. HAIL: Okay. All right. Moving on  
20 from Rooker-Fedlman the, talk a little bit about  
21 res judicata which counsel dealt with for a little  
22 bit.

23 First of all, let me -- you know, we  
24 had to take out -- we have Impact. We've been  
25 broadly talking about the Impact entities or

1 Impact Group, and that's fine, but we need to make  
2 clear there's Impact, there's Mr. Calce, there's  
3 Mr. Heyn. Mr. Calce, Mr. Heyn have personal  
4 indemnification. We've talked about that in  
5 connection with the criminal proceedings, I just  
6 want to make clear, there is no question that was  
7 not something that was dealt with at trial in any  
8 way, shape or form. It would have been physically  
9 impossible in the Department of Justice since it  
10 happened afterwards, and even with regard to  
11 Panola County which arose approximately two weeks  
12 before the commencement of trial, there's no  
13 conceivable way we could have raised that issue  
14 and dealt with that issue.

15 You don't -- you find that out three or  
16 four days before you do an opening argument that  
17 there's something with Panola County we're suppose  
18 to run down to the Court and ask to do a trial  
19 amendment real quick and argue to the Jury.

20 And as I said, it wasn't a hundred  
21 percent clear from Mr. Roberson's arguments  
22 whether they're taking that far a position, but  
23 with regard to Mr. Calce and Mr. Heyn, I don't  
24 think there's any question and no argument -- it  
25 wasn't raised by them, wasn't pled in any way,

1 shape or form, it couldn't have been those type of  
2 issues, so I think in the Court's mind, hopefully  
3 the Court will deal with that separately.

4 THE COURT: Well, and at least,  
5 Mr. Roberson, check this. I don't understand you  
6 to be arguing that the what I'll call the  
7 deficiency, that the \$610.72 plus costs and the  
8 6776.30 plus costs are barred by res judicata?

9 MR. ROBERSON: Your Honor, I'm not  
10 arguing they are barred by res judicata, but  
11 similarly, I'm not arguing that -- I think at  
12 this point we don't know what they are. All we  
13 can tell is that based on that page of their Proof  
14 of Claim that they say they have fees and expenses  
15 in that amount. Whether they can prove that or  
16 not --

17 THE COURT: I understand, but you're not  
18 arguing that items -- that the remaining  
19 portions of Item 20 and 21 that you're entitled to  
20 Summary Judgment based upon res judicata?

21 MR. ROBERSON: Correct, I am not seeking  
22 Summary Judgment on those amounts, nor to clear up  
23 the point that Mr. Hail just raised, nor are we  
24 seeking Summary Judgment today on any portion of  
25 the amounts incurred by them in responding to

1 either the State or Federal subpoena. We think  
2 those numbers, as I indicated, but note one of our  
3 moving papers is about \$80,000.

4 THE COURT: Right. Okay.

5 MR. HAIL: Okay. Thank you. This  
6 exercise has been good today, to come down and  
7 clarify some issues. I'm glad we're doing this.  
8 Appreciate Your Honor taking -- actually, it's  
9 going to be the entire afternoon it looks like.

10 So, let's go back to res judicata with  
11 regard to Impact because that's certainly a sticky  
12 or more complex issue.

13 At the outset I think the Court needs to  
14 consider the jurisdictional aspect of what was  
15 happening down at the State Court level.

16 The pleading speak for themselves. I  
17 think counsel properly presented what was in  
18 various pleadings.

19 With one slight exception in a couple  
20 situations where we referred it loosely to  
21 indemnity, there was that fee provision that they  
22 got recovery for. There's a couple of times, some  
23 things they flashed up, but not by any means being  
24 misleading, but if the Court goes back and looks,  
25 I think you'll see it was dealing more with

1 reimbursement of fees. Probably could be a little  
2 more careful in our language, but clearly we did  
3 raise the broader scope of indemnity under Annex A  
4 in various pleadings.

5 Contexturally, that came up a little bit  
6 late in the case. I would raise that issue, the  
7 Court was not going to entertain it, and I know  
8 there's no rulings in the record necessarily you  
9 can go to or we would have cited to them. The  
10 Court wasn't going to entertain that. Frankly, we  
11 didn't worry about it a whole lot because we  
12 didn't believe it really occurred until later. We  
13 were raising the issue a little as belt and  
14 suspenders and then once it became obvious the  
15 Court wasn't going to do anything, we left it at  
16 that.

17 So, the question is: At the time the  
18 Court -- any issue was submitted to the Jury or  
19 the Court signed off on the Final Judgment, had  
20 the claims accrued, if the claims had not accrued,  
21 the Court does not have jurisdiction.

22 THE COURT: Oh, but I disagree with you.  
23 On Getty, Getty says differently, and that's Texas  
24 Supreme Court.

25 You weren't obligated to assert your

1 indemnity claims, but at least as I read Getty,  
2 and Mr. Roberson, as we've discussed earlier,  
3 reads it even more broadly than I have so far, but  
4 I think at a minimum, Getty says, "If you choose  
5 to assert your indemnity claims, you gotta assert  
6 them all."

7 And in Ingersol-Rand they expressly  
8 reaffirmed Getty. They said, you know, "This case  
9 is different than Getty, Getty is still good law."  
10 And so, why isn't Getty dispositive on this issue?

11 It appears that you did raise the  
12 indemnity issue, didn't have to but you chose to.  
13 I completely agree with you that your indemnity  
14 claim did not mature until there was judgment  
15 entered against you, but you have the right  
16 permissively to bring it ahead of time for  
17 judicial economy, for whatever reason, and it  
18 appears from the pleadings that you did that.

19 So, why aren't you barred by res judicata  
20 from now demanding indemnity broader than what you  
21 sought at trial because it appears that those  
22 claims -- I mean, you tell me that the State  
23 Court Judge didn't really entertain them, but it  
24 appears that he did.

25 MR. HAIL: Well, just to clarify a little

1 bit. We had our pleading out there, and I believe  
2 even right around that time -- because there's a  
3 Rule 11 in there. I think Ms. Diaz was going to  
4 go into some other issues or she had some new  
5 damage models, and the Judge was "We're not going  
6 to deal with that, you know, ladies and  
7 gentlemen." I mean, "We're just -- that's not  
8 going to be part of this, we got this case has  
9 been going for trial, we're going forward."

10 And as said, we didn't feel like --  
11 weren't even sure when we brought those whether it  
12 was appropriate to bring because they hadn't fully  
13 -- they hadn't accrued yet, but we brought those,  
14 and the pleadings are what they are, the Jury  
15 Charge is what it is, I mean, are the --

16 THE COURT: But why didn't you nonsuit  
17 them? If the Judge said, "We aren't going to  
18 address these," then why didn't you say, then  
19 "Time out, we need to nonsuit these so that we  
20 aren't precluded later from bringing them?"

21 MR. HAIL: Well, all I can say is we  
22 didn't nonsuit it and we were not looking at it  
23 from an issue of issue preclusion at a later  
24 point. I think they're accurate. I mean, there's  
25 nothing on the record certainly where it was

1 nonsuited in a formal fashion. I think that's  
2 accurate.

3 THE COURT: Okay.

4 MR. HAIL: Anyway, that's response on the  
5 res judicata.

6 THE COURT: Well, but, so do you have any  
7 case law that says that you aren't bound --

8 MR. HAIL: You know, I got to tell you  
9 when you raised the Getty case, I haven't read  
10 that case in awhile and every now and then -- I  
11 know all of us practitioners like to act like  
12 every case is off the top of our head. I haven't  
13 read that case in awhile, and so, I'm at a little  
14 bit of a loss just standing here, and I hate to  
15 ever say that because usually I'm able to respond  
16 about anything or at least try. I'm not able to  
17 better respond than I can at the moment. We will  
18 look a little bit more carefully honing in on that  
19 and see if there is some case law that would more  
20 directly address that issue and the argument that  
21 I'm making, and if Your Honor would indulge us,  
22 we'll look at that very quickly and get back  
23 something to you, but beyond that, that's all I  
24 can say here at the moment.

25 THE COURT: Fair enough. Fair enough.



1 MR. HAIL: Beyond that, I think that  
2 generally addresses the points in the respective  
3 motions, and I believe I generally responded to  
4 Mr. Roberson without into unnecessary detail. I  
5 don't know if you may have a couple more comments.  
6 Do you have any other questions or comments before  
7 I sit down to understand any issue?

8 THE COURT: I don't think so, Mr. Hail.  
9 Thank you.

10 MR. HALE: Okay. Thank you, Your Honor.

11 THE COURT: You've been very helpful.

12 MR. HALE: Appreciate it.

13 THE COURT: Mr. Roberson.

14 MR. ROBERSON: Your Honor, I'll try to be  
15 brief, and I appreciate the Court giving us the  
16 afternoon. I also appreciate the Court's efforts  
17 to try to narrow this.

18 Here is what I think is remaining and my  
19 observations on what's remaining.

20 17 remains to the extent of postpetition  
21 fees.

22 THE COURT: One second, let me get there.

23 MR. ROBERSON: Sorry, Your Honor.

24 THE COURT: Nope. Yes.

25 MR. ROBERSON: Postpetition fees related

1 to the indemnity issues and/or Panola County,  
2 depending on how the Court rules here. If it's an  
3 indemnity issue, I think there are no postpetition  
4 fees, and if it's a Panola County issue, there may  
5 be fees.

6 The postpetition interest, again --

7 THE COURT: Well, except 17 is -- part  
8 of 17 is collection costs that you -- that at  
9 least I still -- I understood you to be saying  
10 were not recoverable because they weren't asked  
11 for at trial.

12 MR. ROBERSON: I think they're all  
13 collection costs. What I've heard the Court say  
14 is that based on the representations of  
15 Mr. Spector, that the Court will entertain or  
16 appears to be willing to entertain an argument  
17 that part of 17 and 18 are recoverable to the  
18 extent there's an underlying basis to recover  
19 either Panola County or indemnity. Clearly, the  
20 proof is in the pudding. I have seen the bills  
21 and I believe they can be allocated, but we won't  
22 know how to allocate them until the Court decides  
23 whether indemnity is completely out of the case.  
24 Then the only thing left is Panola County.

25 THE COURT: Okay, but I'm getting

1 confused again. So, help me. I did not  
2 understand 17 to have anything to do with the  
3 criminal investigations. I understood 17 to  
4 solely be Mr. Spector's -- essentially,  
5 Mr. Spector's fees incurred in connection with the  
6 bankruptcy case.

7 MR. ROBERSON: I agree with that, but  
8 what Mr. Spector said -- I'll try to paraphrase  
9 him without butchering what he said.

10 I heard him say, "Judge, I can't break --  
11 I can't allocate my \$30,000, how much time I spent  
12 preparing a Proof of Claim for Panola County."

13 THE COURT: Right.

14 MR. ROBERSON: -- "how much time I spent  
15 on collection, how much time I spent on this or  
16 that." So, I think there is a --

17 THE COURT: Yeah, but basically, this is  
18 -- I mean, this is Mr. Spector's time in  
19 representing the Impact Claimants in connection  
20 with the bankruptcy case?

21 MR. ROBERSON: Yes, that's correct. I  
22 agree with that.

23 And to the extent we can narrow it here  
24 today, I think it's all collectin. They obviously  
25 have an argument that part of it may relate to

1 Panola County or indemnity, and my observation is  
2 to the extent that it relates to collection and it  
3 relates to indemnity which I think, as I've said  
4 several times, and will a couple more, indemnity's  
5 out of the case, so it may be that we have to take  
6 this entire 30,000-dollar amount and try all of it  
7 and figure out what's what.

8 THE COURT: Well, if -- well, if  
9 indemnity is out of the case, is there a basis  
10 upon which the postpetition fees are recoverable,  
11 Mr. Spector?

12 MR. SPECTOR: Your Honor, my  
13 understanding of our basis for reimbursement of  
14 the Panola County fees is indemnity, so at least  
15 that indemnity claim is not out of the case.

16 THE COURT: No, no, I understand, but put  
17 -- don't talk Panola County yet. But if --  
18 well, if I were to rule that the indemnity does  
19 not cover claims between Dorado and Impact, what  
20 is the theory for recovery of Item 7?

21 MR. SPECTOR: If you were to rule that we  
22 cannot be reimbursed for our participation in the  
23 Panola County case, and I believe our basis for  
24 reimbursement is our indemnity contract, then  
25 there would be no basis for recovering my fees.

1 THE COURT: Well, but I'm getting  
2 confused because 30,000 -- some of the 30,000 is  
3 Panola County.

4 MR. SPECTOR: It's not Panola County in  
5 the sense of "I didn't participate in Panola  
6 County.

7 THE COURT: Right.

8 MR. SPECTOR: It's our claim, it's our --  
9 it's my representation of a creditor whose claims  
10 arise out of his indemnity obligation or out of  
11 his indemnity rights with respect to losses he  
12 incurred in connection with Panola County.

13 THE COURT: Okay. And I'm with you.

14 MR. SPECTOR: Okay.

15 THE COURT: So, to the extent or the  
16 indemnity rights under the Judgment --

17 MR. SPECTOR: Yes.

18 THE COURT: Both?

19 MR. SPECTOR: Correct.

20 THE COURT: So, I'm hearing you say, and  
21 I'm just listening, check, that to the extent I  
22 would rule that the indemnity is not broad enough  
23 or is not specific enough to indemnify Impact from  
24 -- let me say it the easier way.

25 If I were to rule that the indemnity

1 claim only applies to third-party claims, then  
2 Item 17 goes away as does Items 20 and 21, yes?

3 MR. SPECTOR: (No response.)

4 THE COURT: I mean, frankly, I could make  
5 it broader.

6 To the extent I rule that the indemnity  
7 only applies to third-party claims, there is no  
8 claim here, period.

9 MR. HAIL: Can I get some clarity at least  
10 with respect to --

11 THE COURT: Of course.

12 MR. HAIL: If what you're saying is  
13 there's just no indemnity, period, then there's no  
14 basis for any claim here at all?

15 THE COURT: Well, if I were to rule that  
16 the indemnity indemnified you from claims made by  
17 third parties against you.

18 MR. HAIL: But not Dorado?

19 THE COURT: But not from Dorado.

20 MR. HAIL: Okay, that's --

21 THE COURT: What's left of this, if I  
22 were to rule that the indemnity that's set forth  
23 in Annex A is only from third party claims?

24 MR. HAIL: Well, the -- certainly the  
25 Panola County, FB -- I guess the Department of

1 Justice, certainly two, those two broad  
2 categories. The --

3 THE COURT: Okay. So, --

4 MR. HAIL: I think he heard your question  
5 one way, I heard it another, we're trying to match  
6 it up.

7 (Counsel confer)

8 MR. SPECTOR: Mr. Hail used the Panola  
9 County claims as claims by a third party that gave  
10 rise to costs that we incurred that we need to be  
11 indemnified of.

12 THE COURT: Fair enough. Fair enough.

13 MR. SPECTOR: Okay.

14 THE COURT: So that, to the extent that  
15 some of your attorney fees, that some of you,  
16 Howard Spector's attorneys' fees relate to the  
17 protection of that claim, then you would still  
18 assert that --

19 MR. SPECTOR: Correct.

20 THE COURT: -- as a essentially part of  
21 the third party claim process?

22 MR. SPECTOR: Correct.

23 THE COURT: Okay. I'm with you. Thank  
24 you.

25 MR. ROBERSON: Your Honor, so, again,

1 with respect to 17 and 18, in my view, they're  
2 dependent upon how the Court ultimately rules on  
3 whether indemnity beyond Panola County is  
4 indicated, whether or not Panola County claims  
5 themselves implicate indemnity agreement, whether  
6 they're the third party or not, there are still  
7 issues with whether those claims arise pursuant to  
8 the services under the Agreement.

9 I heard the Court indicate that 20 is  
10 limited to 610.72 and 21 is limited to 6776.30, am  
11 I correct?

12 THE COURT: Yes.

13 MR. ROBERSON: All right. Let me focus  
14 on 5 for a minute.

15 5 is a bucket into which -- I keep using  
16 that term and I use it intentionally, into which  
17 the Impact claimants have poured all of their  
18 attorneys' fees.

19 THE COURT: Understand.

20 MR. ROBERSON: Okay. And pursuant to the  
21 request that I made --

22 THE COURT: All of their attorney fees in  
23 connection with the State Court litigation?

24 MR. ROBERSON: All of their attorneys'  
25 fees.



1 THE COURT: Well, not Mr. Spector's.

2 MR. ROBERSON: Mr. Spector's are included  
3 in there.

4 THE COURT: You think the 734 includes  
5 Mr. Spector?

6 MR. ROBERSON: The documentary evidence  
7 that I've been provided in support of Item No. 5  
8 is all attorneys' fees, all costs, for example, it  
9 has fees and expenses all the way through the last  
10 couple of months, it has all of the appellate  
11 fees, it has al the lawyer fees from Mr. Hail's  
12 firm, the criminal firm that was brought in, its  
13 got expense information that I can see directly  
14 corresponds to a trial exhibit, and that has been  
15 the conundrum that we've been trying to deal with  
16 since Day 1, what -- first of all, there's two  
17 issues there.

18 THE COURT: So, wait, wait. So, instead  
19 of -- so, you think the 734 includes a \$100,000  
20 -- you think No. 5 includes 13 and 14?

21 MR. ROBERSON: Your Honor, let me look at  
22 13 and 14.

23 THE COURT: That's the 150,000 awarded in  
24 the Judgment for Impact's appeal.

25 MR. ROBERSON: Yes, and let me explain

1 why I think that.

2 The Judgment awards appellate fees of 100  
3 and 150.

4 THE COURT: Correct.

5 MR. ROBERSON: The 734 is the sum of  
6 (away from mic). There may be more than 150,000.  
7 There may be less, but there are appellate fees in  
8 the bundle that have been produced that are  
9 clearly incurred after submission. There are  
10 collection fees in there that are incurred after  
11 submission that clearly relate to the trial. I  
12 believe Texas law says, if you want those fees,  
13 cited the case (can't hear) 68 and 69. I think  
14 the State law says, if you want those fees, you  
15 better ask for them. If you get them, you've got  
16 them, and you can't get them -- and my concern  
17 here is that they have pled a generic number of  
18 734,000, and said, "If you want the supporting  
19 document, we'll give them to you." I've asked for  
20 them, I've gotten them.

21 If you'll recall, we had a Motion to  
22 Compel which we have not yet completed, and that  
23 dealt with whether redactions in those various  
24 invoices needed to be unredacted so I could tell  
25 what those fees were for, but I will represent to

1 the Court that there are numerous law firms in  
2 there, many of them prior to the date of the trial  
3 and many since. And what I can read, it appears  
4 to me to be trial fees and it appears to be  
5 appellate fees and it appears to collection fees,  
6 and while I can see state and federal  
7 investigation fees in there, I agree with  
8 Mr. Hail, I can't see how they could have brought  
9 them in a trial given the time of the trial,  
10 whether they are subject to (away from mic).

11 What Mr. Hail testified to at trial is  
12 Exhibit Defendant's No. 13 was his firm incurred  
13 463,000 fees at trial. He testified that under  
14 the Goda (phonetically spelled) case, he reduced  
15 it by 88,000 because that was fees that weren't  
16 recoverable, and when asked, he said those related  
17 to Temporary Restraining Order hearings and a  
18 couple of other hearings, I don't recall what they  
19 were.

20 But what I'm telling the Court is, of  
21 that 734,000, it is larger than 463,000.  
22 Coincidentally, a portion --

23 THE COURT: Oh, but he's already said  
24 there were other firm fees in there.

25 MR. ROBERSON: No question about it,

1 there's no questions about it, but they relate to  
2 the trial. Whether he asked the Court, asked the  
3 Judge and the Jury at the trial court level to  
4 award those fees or not is their problem.

5 Texas law says you ask for them or you  
6 don't. If you don't, you don't get them later.

7 So, if they --

8 THE COURT: Let me play devil's -- I  
9 mean, that seems a little unfair. If Texas law  
10 has a statutory predicate for the recovery of  
11 fees, but if I were to disagree with you and find  
12 that the indemnity was broad enough to cover  
13 attorney fees, why shouldn't they be entitled to  
14 recover the attorney fees -- you're going to  
15 argue -- your answer to that is going to res  
16 judicata because they didn't ask for them at  
17 trial.

18 MR. ROBERSON: Well, two -- maybe three  
19 answers.

20 One would be they're subject to  
21 reasonable and necessity standards.

22 THE COURT: Right, but --

23 MR. ROBERSON: Two, res judicata, and  
24 three, they've got to be subject to -- they  
25 themselves have to trigger the underlying

1 indemnity agreement. The Hooper case which I've  
2 referenced --

3 THE COURT: I'm sorry. I'm not following  
4 that. They themselves have to trigger --

5 MR. ROBERSON: All right. An Indemnity  
6 Agreement says, "I, the Indemnitor, indemnify you  
7 the Indemnitee from claims made by third parties  
8 for damages as a result of claims made by third  
9 parties. And --

10 THE COURT: Well, let's assume I read it  
11 broader than that.

12 MR. ROBERSON: Okay.

13 THE COURT: If I read it the way they want  
14 me to read it, that you would read to indemnify  
15 them for damages that they incurred in connection  
16 with the Engagement Letter?

17 MR. ROBERSON: Right.

18 THE COURT: And they say, "We incurred  
19 all of these legal fees and that's part of our  
20 damages, and under Texas State law unfortunately  
21 we could only recover two-fifths of them, but  
22 there were still three-fifths more that we  
23 reasonably incurred," I understand that we haven't  
24 proven reasonableness yet, but they say that.

25 Why aren't they entitled to assert that

1 under their indemnity right?

2 MR. ROBERSON: I think to the extent they  
3 have indemnity right that sounds under this  
4 Agreement, I think that they -- subject to  
5 reasonableness and necessity, I think they would  
6 have the right to recover, but the point I was  
7 trying to make to the Court is, indemnity  
8 agreements typically have two prongs. You can be  
9 indemnified for damages. You can also be  
10 indemnified for fees you incur defending yourself  
11 against those damages.

12 The cases that look at the two-party,  
13 three-party issue look at both, they look at  
14 whether this is a two-party agreement on damages  
15 for recovery of damages, on claims between the  
16 indemnitor and the indemnitee. And they also look  
17 at recovery just attorneys' fees in a two-party  
18 situation are recoverable, and they go through the  
19 same analysis known as cooperation, et cetera.

20 So, to answer your question, Your Honor,  
21 if they are entitled to indemnity and they can  
22 prove that the fees were reasonable and necessary  
23 and you decide that indemnity is implicated, then  
24 I think they've got to prove them up, but my point  
25 to you is that at the trial court, the testimony

1 from Mr. Hail was that he had incurred \$463,000,  
2 and what I'm indicating to you is that the  
3 evidence that they have provided me in this bucket  
4 of invoices includes not only Mr. Hail's fees, but  
5 appellate fees, collection fees and other fees,  
6 including fees related to state and federal  
7 investigation.

8 They do not allocate them, and that's  
9 what we talked about on the Status Conference on  
10 the 17th of February, it's what I thought I had an  
11 agreement to do prior to the Motion to Compel and  
12 Status Conference on the 4th of March, and we are  
13 sort of back to where we started. We got a little  
14 bit smaller Delta, but we do not have an  
15 allocation of what goes into that 734,000.

16 If you determine that there is no  
17 indemnity, no right to indemnity because it was  
18 pled and overruled by the Mother Hubbard clause,  
19 then I think the 734,000 number is zero. But maybe  
20 it's less, it's slightly more than zero because of  
21 the inclusion of the state and federal court  
22 investigation.

23 My problem is and the problem that we're  
24 going to have between now and trial is unless the  
25 Court deals with the Motion -- if we're going

1 forward, unless the Court deals with the Motion to  
2 Compel so that we can see what these fees are for,  
3 and compels some sort of allocation of these fees,  
4 there's no way to tell what they are, they're just  
5 a bucket of fees.

6 Let's assume there's --

7 THE COURT: Is the Motion to Compel set?

8 MR. ROBERSON: Not set. It was carried  
9 from a prior hearing. We have a Motion to Strike  
10 an Amended Proof of Claim on the 29th, and  
11 depending upon how the Court decides today, we may  
12 be asking the Court to reurge it, but my problem  
13 is looking for a needle in a 359,000-dollar  
14 haystack, and my representation to the Court is  
15 that there are significant amounts of appellate  
16 collection fees in there that relate to the State  
17 Court trial.

18 So, we've got to figure out some way to  
19 narrow this down. I think that the way to narrow  
20 it is that if indemnity is not indicated, the only  
21 ability they've got to recover for fees, for the  
22 fees and expenses associated with the state and  
23 federal investigation.

24 THE COURT: Well, and they've admitted  
25 that.



1 MR. ROBERSON: They've admitted that.

2 THE COURT: I don't think there's any  
3 dispute about that at this point.

4 MR. ROBERSON: Correct, but to the extent  
5 the Court finds that they may have an entitlement  
6 to indemnity, we're going to have to unravel that  
7 onion.

8 Your Honor, I'm advised by Mr. Mesches  
9 that we can provide the Court evidence of this.  
10 Neither Mr. Calce or Impact challenged the trade  
11 secret liability finding on appeal.

12 I'm also advised that there's case law,  
13 and I can't cite the case but I will in the  
14 follow-up briefing give it to the Court that  
15 equate a misappropriation to a conversion and  
16 conversions are clearly an intentional tort, and I  
17 will get that case law for the Court.

18 The other thing that I would point out to  
19 the Court --

20 THE COURT: But you can have a negligent  
21 conversion, it doesn't have to willful, I think,  
22 if memory serves.

23 MR. ROBERSON: I think you could. I  
24 think, though, the only way to square the Jury's  
25 finding is that whatever happened, happened

1 intentionally. It was either a breach of a  
2 confidential relationship, it was breach of a  
3 contract, or -- I don't think you can read that  
4 Jury question any other way. I think you have to  
5 give it the fairest reading you can.

6 The Court has asked the question about  
7 intentional tort. We'll give you that.

8 Next, Your Honor, I want to make sure the  
9 Court understands that the Judgment that was taken  
10 by Dorado against the Impact Group, there are four  
11 parties to that, and that Judgment was several.

12 THE COURT: Right, each one's 25 percent  
13 liable.

14 MR. ROBERSON: Right. Only three of those  
15 parties are before the Court. Blue Lion which was  
16 one of the Judgment Defendants is not before this  
17 Court, it is not a Claimant, so to the extent the  
18 Court --

19 THE COURT: So, at most, they're entitled  
20 to three-fourths of --

21 MR. ROBERSON: Three=fourths of -- you  
22 go back to --

23 THE COURT: -- the 400 plus, yeah, three-  
24 fourths of whatever your Judgment was against  
25 them, yeah, I'm with you.

1 MR. ROBERSON: Correct, and all the  
2 (can't hear, away from mic.)

3 Your Honor, Mr. Hail suggested that you  
4 should proceed to enter a liability finding on  
5 Panola County and federal investigation.

6 I would point out that we do have the  
7 Affidavit of Mr. Schmidt. It does indicate that  
8 the investigations are unrelated to (can't hear)  
9 under the Agreement.

10 I would note that his Affidavit indicates  
11 that what they were doing raising money, observe  
12 that that Agreement was long since terminated by  
13 the time these investigations started.

14 THE COURT: Well, but it -- well, there  
15 may not be evidence of this, but it makes sense  
16 what Mr. Hail has told me that to the extent the  
17 investigation is looking backwards, it could be  
18 looking during the periods of time while the  
19 engagement was still ongoing.

20 MR. ROBERSON: It could be, and my point  
21 to the Court is, I don't think at this point based  
22 on this record you have evidence sufficient to  
23 award a Judgment either way. I think we're going  
24 to have to go determine what happened in that  
25 investigation.

1           Your Honor, that is all that I have to  
2 say to the Court. I would in terms of  
3 housekeeping ask the Court to put the Motion to  
4 Compel on the docket either earlier than the  
5 Motion to Strike or at the hearing on the Motion  
6 to Strike.

7           Secondly, I would ask the Court to  
8 overrule the objections that were filed today at  
9 noon to the Affidavit of Don Schmidt.

10           And then lastly, I'd like to get some  
11 guidance from the Court on timing for post-  
12 briefing after this hearing so that we're not --  
13 we have a trial setting sometime in June, and we  
14 need to move this thing along, so if there's going  
15 to be post-trial briefing, I'd like the Court to  
16 set up a schedule and we'll adhere to it.

17           THE COURT: All right. Thank you.

18           MR. ROBERSON: Thank you, Your Honor.

19           THE COURT: Mr. Hail?

20           MR. HAIL: Yes, Your Honor.

21           THE COURT: No. 5, does it include parts  
22 of the 100 and \$150,000?

23           MR. HAIL: I don't believe so, I really  
24 don't. What may be slightly confusing is our  
25 appellate counsel, Mr. Levinger, Hankinson

1 Levenger, maybe Carrington Coleman at the time he  
2 was there, now Hankinson Levinger (phonetically  
3 spelled), he was involved in some of the trial  
4 process doing Jury Charge and some trial, but you  
5 know, for parts I think appellate help.

6 I don't believe it does. We are  
7 certainly -- I made a note to myself to go back  
8 and do some double checking, but that's not the  
9 intent, and I know that we will -- we'll take a  
10 look into that.

11 THE COURT: Well, do, and to the extent  
12 that there is amounts that are --

13 MR. HAIL: That would be in another  
14 category, yes, we'll make that clear.

15 THE COURT: All right.

16 MR. HAIL: Yes, Your Honor.

17 THE COURT: All right.

18 MR. HAIL: And just a couple real brief  
19 rebuttal points, a couple of things counsel  
20 raised.

21 One, with regard to the nonappeal of the  
22 misappropriation, all we -- first of all, we're  
23 appealing the heck out of the damages. It's a  
24 crazy damage theory, but that's neither here nor  
25 there, but there was conflicting evidence in the

1 record about, I was given authority by Mr. Wafford  
2 to send this over to this company and then  
3 Ms. Wafford said no, I didn't. The Jury found in  
4 one way. Obviously, there's legally sufficient  
5 evidence to support that finding, so we're not  
6 trying to disturb that. By no way is that some  
7 admission, you know, of that general concept.

8 The other thing is, said there's no way  
9 -- have to talk about, you know, the only way to  
10 square that finding is it's some sort of implicit  
11 breach of a confidential relationship. Well, a  
12 breach of a confidential relationship is called  
13 "breach of fiduciary duty." It's a cause of  
14 action in Texas. And there's specific elements.  
15 You can't -- if someone would be able to  
16 extrapolate that into a breach of fiduciary  
17 finding -- imagine if we were trying to get a  
18 trial amendment and go with that finding by the  
19 Jury could support a breach of fiduciary duty,  
20 there's no way that can happen. And I said  
21 there's a gap -- there's two gaps, there's ABC  
22 gap and then also that gap.

23 And then the final point of Mr. Schmidt's  
24 Affidavit, you can read it, you can see how, I  
25 don't conclusory and unsupported it is and

1 certainly make whatever rulings Your Honor deems  
2 appropriate.

3 Another thing I'd point out --

4 THE COURT: Well, what are your issues?

5 MR. HAIL: One other thing -- I think  
6 you may have the only copy that I had admitted.  
7 One other thing before I look at that maybe I  
8 could raise.

9 If you think about the timing you were  
10 asking, what's the term, the entire scope of our  
11 engagement, and it's six months plus eighteen, so  
12 two years. We were engaged April '06. That would  
13 have --

14 THE COURT: '05, I thought.

15 MR. HAIL: Was it '05? Okay. April '05  
16 to all the way up to April '07, so anyway, you can  
17 look at that with the timing of what the  
18 investigations were. And I know because Your  
19 Honor dealt with a lot of these investors, I  
20 believe all the securities have been sold prior to  
21 that time. I believe many of them were claimants  
22 in the underlying bankruptcy proceeding.

23 But, anyway --

24 THE COURT: Do you need --

25 MR. HAIL: You know, I may have one right

1 here, Your Honor. Forgot I had another notebook  
2 with me. Okay.

3 Paragraph No. 5, we've got objections to  
4 four of the paragraphs to the extent that certain  
5 portions of them are legal conclusions and lack of  
6 foundation.

7 You know, for example, I mean Impact  
8 Group Services under the Agreement were limited in  
9 their efforts to find funding. I mean the  
10 Agreement speaks for itself in that regard. This  
11 is an attempt to characterize that I think is  
12 improper.

13 Looking at, you know, more fundamentally  
14 I think for purposes of what we're talking about  
15 here, if you, for example, to Paragraph No. 9  
16 talking about going in front of the Grand Jury,  
17 first of all, I mean I -- I'm not sure he's not  
18 getting dangerously close to violating the Grand  
19 Jury confidentiality, but that's an issue I guess  
20 I'm going to leave to him in that regard.

21 But to say the Grand Jury investigation  
22 dealt only with outstanding invoices issued by  
23 contractors is the reason why such invoices were  
24 not paid, I'm not aware of the DA having to make  
25 him aware of all the different issues that he's



1 investigating, his attempt to characterize what  
2 the investigation was and limit the scope of it I  
3 think is improper.

4 Then you get, for example, to Paragraph  
5 No. 10. Mr. Schmidt is attempting to state that  
6 the Department of Justice was investigating his  
7 Secretary taking some of his personal documents.  
8 The Department of Justice is going to investigate  
9 a Secretary taking a Texas boss financials and  
10 personal information, and that's completely  
11 undermined by Item No. 2 of the Department of  
12 Justice subpoena asking for all documents  
13 regarding his representations to investors. Part  
14 of what they were seeking was to the extent she  
15 was taking actually stockholder records and other  
16 type of information which was part of the bundle  
17 of information she took and she provided over,  
18 they wanted that as well.

19 But basically he makes it looks like --  
20 I'll call it the FBI and they went and got this  
21 big investigation of my Secretary, taking some of  
22 my documents. That is a gross mischaracterization  
23 of it, no foundation. I can tell you from  
24 personally dealing with the Department of Justice,  
25 they're not real forthcoming about their scope of

1 their investigation. You know, they don't really  
2 share just a whole lot, they ask a lot more  
3 questions than they answer.

4 I think you can just -- and I know I'm  
5 hitting this quickly because we're getting kind of  
6 late in the day, and I think you can see that  
7 basically the big problem we have with this  
8 Affidavit is his attempt to narrow the scope or  
9 you know, put the spotlight over here as to what  
10 this related to and distinguish it from the  
11 services that my client was provided I think are  
12 improper and objectionable. Obviously, if we go  
13 to trial, we'll cross them and deal with those  
14 issues, but for purposes of preserving the record  
15 and our objections, I think those are issues that  
16 we've raised.

17 We'd ask the Court to consider them as  
18 the Court deems appropriate.

19 THE COURT: Thank you. Response?

20 MR. ROBERSON: Briefly, Your Honor. I'll  
21 reurge my objection that I made when we started.  
22 It's late. Had the objection been timely filed,  
23 had an opportunity to amend the Affidavit to the  
24 extent we thought it was necessary.

25 Secondly, with respect to Paragraph 5,

1 Mr. Hail has already argued that the scope of the  
2 services was financial advisory which is very  
3 broad.

4 As the President of DEI, I think  
5 Mr. Schmidt can --

6 THE COURT: But can't I decide what the  
7 scope was?

8 MR. ROBERSON: Sure, but if the scope was  
9 this big and they're financial advisory and all he  
10 did was try to raise money, I think that's within  
11 the purview of the President of the company to say  
12 what they actually did, and that's what they  
13 actually did, they sought to raise money.

14 THE COURT: Oh, but he characterizing  
15 this under the Agreement, it was limited to.  
16 Isn't that for me to decide what the scope of the  
17 Agreement is?

18 MR. ROBERSON: I agree, but I think  
19 there's two parts to the question. Does the  
20 Agreement limit it, and if the Agreement doesn't  
21 limit it, was the the actions actually taken?

22 THE COURT: But that's not what he's  
23 saying here, Mr. Roberson. He's saying here that  
24 Impact Group Services under the Agreement were  
25 limited to.

1 MR. ROBERSON: Again, Your Honor, maybe  
2 if we had a timely objection, the Amendment would  
3 have said, "The services provided under the  
4 Agreement were limited." The point is that they  
5 did not provide financial advisory services. You  
6 heard Mr. Hail here argue that that's why they  
7 were subpoenaed because they had shareholder  
8 records. I think what you're ultimately going to  
9 hear is, their services ended six months after  
10 they started. They had a tail much like a real  
11 estate broker, and they argued when the closing  
12 occurred with an entity, they argued they had a  
13 right to a fee, but I think what the evidence is  
14 going to be, they didn't have anything to do with  
15 the shareholders or anything else, so the point is  
16 that what they actually did was less than what the  
17 Agreement provided for.

18 With respect to his observations, what he  
19 saw in the Grand Jury, those are his observations.  
20 It's his impression based on the investigation as  
21 it related to him.

22 THE COURT: Well, but that's not what  
23 this says either. "The Grand Jury investigation  
24 dealt only with outstanding invoices issued by  
25 Panola County." How would he possibly know what

1 the investigation dealt with or didn't deal with?

2 MR. ROBERSON: Well, couple of reasons.

3 One --

4 THE COURT: I mean, he may have an  
5 opinion as to what it is, but he can't know. I  
6 mean, I can't imagine anybody told him exactly  
7 what the investigation was all about.

8 MR. ROBERSON: I'm not sure agree with  
9 that, Your Honor. When the investigation is over,  
10 the investigation is concluded, and to the extent  
11 there was ever any confidentiality, vis-a-vis  
12 Mr. Schmidt, I believe that confidentiality is  
13 also gone. The Court has heard in the main case  
14 about the disputes in Panola County with the  
15 contractors. I think Mr. Schmidt can opine his  
16 view of what happened in Panola County. I think  
17 that's what this does.

18 And lastly, with respect to Paragraph 10,  
19 Amy Boyles was an employee, she took documents. I  
20 think the record in the trial court will indicate  
21 that she gave those documents to Mr. Hail just  
22 before the commencement of the trial and he  
23 reported the theft of those documents to the FBI,  
24 Social Security information, apparently had  
25 shareholder information, obviously, securities

1 issues, and they commenced an investigation.

2 We can see from the subpoena which is  
3 attached to his Affidavit in which Mr. Hail  
4 referred to earlier that they were attempting to  
5 get the records from Ms. Boyles that Ms. Boyles  
6 took from Dorado's offices.

7 Again, I think all this does is raise an  
8 issue of whether what was being investigated was  
9 related to services provided under the Agreement,  
10 and I think it puts it in issue.

11 THE COURT: All right. Fair enough.

12 MR. ROBERSON: And we'd ask the Court to  
13 overrule the Objection.

14 THE COURT: The Court is going to  
15 overrule the objection on timeliness grounds.  
16 This should have been filed more than an hour and  
17 fifteen minutes prior to the hearing on the  
18 Summary Judgment because Mr. Roberson's correct,  
19 that has prejudiced them from the standpoint of  
20 not having the opportunity to attempt to reword an  
21 Affidavit so that it might not be objectionable.  
22 There was no excuse provided as to why this was  
23 not filed in a timely fashion so that it could be  
24 considered appropriately by the parties, so I will  
25 overrule the objections for the simple reason that

1 they were filed too late to be meaningfully heard.

2 All right. I am not prepared to announce  
3 a ruling on the balance of the issues that remain,  
4 but I do think today has been extremely helpful  
5 because we have certainly narrowed the scope of  
6 trial dramatically without even a ruling by the  
7 Court on anything. That's always the best.

8 So, in any event, I will attempt to issue  
9 a decision very promptly because I know everyone  
10 is hoping to go to trial in June, but I will also  
11 warn you that I have several other matters that I  
12 am working on and hoping to get detailed written  
13 opinions out on soon.

14 But I would like -- I may not write on  
15 this, I may well just issue an oral ruling to try  
16 and save time because I'm not sure there will  
17 sufficient time given other commitments between  
18 now and June to get a written opinion issued and  
19 still be done meaningfully so that you can prepare  
20 for trial. So, I would like any remaining briefs  
21 in very promptly. So, what does anybody need?  
22 The issue that I would like some help on frankly  
23 is this intentional tort issue with respect to  
24 theft of trade secrets, whether or not that is  
25 going to fit within the exclusionary language of

1 the indemnification provision or not.

2 And then, Mr. Hail, you mentioned  
3 something else that you wished to brief, and it's  
4 escaping me right now.

5 MR. HAIL: Res judicata and Getty, that  
6 issue.

7 THE COURT: So, how much time -- when  
8 can you get briefs in on those issues?

9 MR. ROBERSON: Your Honor, on the  
10 intentional tort issue, we can get it to you by  
11 Friday, and I would like a couple of days after he  
12 files whatever he's going to file, to respond.

13 THE COURT: What about both of you filing  
14 briefs by Friday, and if you want to reply by  
15 Monday?

16 MR. HAIL: The only thing I would ask,  
17 I've got another case to clear my docket. I've  
18 got a significant only because it's my case I  
19 guess, but I have a significant oral argument on  
20 Tuesday morning at the Dallas Court of Appeals  
21 that I had set aside my weekend to really get  
22 ready for, so that would be just a little tight.  
23 Could we have a couple days beyond that?

24 THE COURT: To reply?

25 MR. HAIL: To reply, yes, even until



1 Thursday morning would be great, least the end of  
2 the day Wednesday so I can get focused. I can put  
3 a little bit of time into but I can get back after  
4 it right when I get done with my argument.

5 THE COURT: Fair enough. If you would  
6 get what I'll call your opening briefs in  
7 addressing, Mr. Roberson, your -- well, both of  
8 you will be addressing the intentional tort  
9 question or whether the theft of trade secrets  
10 fits within the exclusionary language of the  
11 indemnity or not. And to the extent you want to  
12 argue about the Quantomero (phonetically spelled)  
13 unclean hands, help yourself. And then you'll  
14 file your brief with respect to Getty Oil and  
15 related issued. That will all come in by 5  
16 o'clock Friday. And then let's say Thursday  
17 morning at 10 for replies to each other's if you  
18 feel the need to. You don't have to reply, but if  
19 you wish to, by 10 o'clock Thursday morning, and  
20 then the Court will consider the matter under  
21 submission.

22 MR. ROBERSON: Very well. Thank you,  
23 Your Honor.

24 MR. HAIL: Thank you.

25 THE COURT: Good. You're excused. I'm

1 going to be out here for a minute.  
2  
3  
4  
5

6 CERTIFICATE

7 I certify that the foregoing is a correct  
8 transcript from the electronic sound recording of  
9 the proceedings in the above-entitled matter.  
10  
11  
12

13 \_\_\_\_\_  
14 Darla M. Chavez, Transcriber

15 Dated: \_\_\_\_\_

16 \*\*Note: Any spellings not available to  
17 transcriber are indicated with (phonetically  
18 spelled)  
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